(1)

Supreme Court of the United States

October Term, 1944

No. 443

INTERCOUNTY OPERATING CORPORATION, and SALONGA FARMS, INC.

Petitioners (Plaintiffs-Appellants below)

against

THE COUNTY OF NASSAU

Respondent

and

ATLANTIC MUNICIPAL CORPORATION, *et al.*, etc.,

Defendants

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

Harry Mesard
Counsel for Petitioners
277 Broadway
New York, N. Y.

APPEAL PRINTING CO., INC., 130 CEDAR ST., NEW YORK, WO 2-3242

INDEX

Petition for Writ of Certiorari

Brief in Support of Petition

TABLE OF CASES CITED

Other Authorities Cited

Supreme Court of the United States

Intercounty Operating Corporation, and
Salonga Farms, Inc.,

Petitioners
(Plaintiffs-Appellants below),

against

The County of Nassau,

Respondents,

and

Atlantic Municipal Corporation, *et al.*, etc.,

Defendants.

PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, above named, respectfully show:

This is a petition for a Writ of Certiorari to review a final decision made June 14th, 1944, by the New York State Court of Appeals, the last resort of all causes of the State of New York, affirming without opinion an order of the Appellate Division of the Supreme Court for the Second Judicial Department, which affirmed with opinion (R. 42-43) an order of the Supreme Court of the State of New York held for the County of Nassau dismissing the Petitioners' complaint with opinion (R. 32-35).

1. Summary Statement of the Matter Involved.

This action for a Declaratory Judgment, pursuant to Section 473 of the New York Civil Practice Act, and Rules 210 to 214, inclusive, of Rules of Civil Practice, Supreme Court, was brought for a declaration of the rights of all parties under Laws of New York, 1941, Chapters 562 and 679 (hereinafter referred to as the Code Amendments, and set out in full in Appendix A), amending Laws of New York, 1939, Chapter 272 (otherwise known as the Nassau County Administrative Code, hereinafter referred to as the Code, the pertinent Sections of which are contained in Appendix B), and for a construction of the said Code Amendments to determine the validity thereof under the Federal Constitution as sought to be applied and put into operation and effect by the Respondent.

Your Petitioners are business corporations, incorporated under the laws of the State of New York, whose chief business consists in making investments in real property, mortgages and tax lien certificates. The Respondent is a municipal corporation, a subdivision of the State of New York. The other Defendants are business corporations or individuals, all tax lien purchasers at the 1941 sale, interested in the outcome of this litigation but who took no part herein.

At sales held by the Respondent on July 14th, 1939, and again on July 10th, 1940, your Petitioners purchased tax lien certificates and invested therein, in the aggregate, approximately $250,000.00. At the dates of said sales the Code provided that a period of 4 years must elapse between the date of sale of a lien and its maturity. The liens purchased by your Petitioners were subject to the

liens of unpaid taxes for subsequent years, which, if sold in the ordinary course under existing provisions of the Code, would also provide that a period of four years must elapse between the dates of their sales and their maturity. Thus, at the times of their purchases of tax liens, the Petitioners were assured under the existing Code, of valid and subsisting lien certificates for a period of at least 4 years, subject only to a prior defeasance by the payment to them of the monies expended for the certificates, plus the interest and penalties provided.

The Code Amendments, (Appendix A) were enacted, effective April 19th and 22nd, 1941. In July of 1941, the Respondent purchased tax liens covering properties affected by the liens previously sold by Respondent to the Petitioners.

Secure in the belief that their rights under their tax lien certificates and their remedies for the enforcement thereof were not affected by the subsequent sales, your Petitioners did nothing until they were notified by Respondent that its tax lien certificates, purchased subsequent to the enactment of the Code Amendments, matured by virtue of said enactments in 1943, and that it would seek to obtain title to the properties affected thereby. In practical effect, the result sought by the County was to deprive your Petitioners of the benefits of their tax lien certificates, which by their terms under the controlling enactment in effect at the time of Petitioners' purchases could not mature until a later date, and to render them worthless, unless, as permissively provided in the Code, the Petitioners were to pay larger additional amounts for the subsequent taxes and add them to their liens. Under the Code prior to the Code Amendments, no subsequent tax liens for accruing taxes

could mature prior to the 4 year period. The drastic effect upon the Petitioners of the giving effect, in such a manner, to the Code Amendments is summarized by Mr. Justice Johnson (R. 32) in the following words:

> "* * * The effect upon the plaintiffs is apparent; Either they must pay large amounts of subsequent taxes sooner than the law required when they purchased their liens, or, by sales for later taxes their liens will be made worthless * * *."

The abrogation, by subsequent legislation, of Petitioners' rights under valid contracts, made under laws in effect at the time, is explicit in the above quoted language. A federal right is involved.

However, the Legislature, in enacting the amendments, desired to bring them in harmony with the Federal Constitution, and therefore expressly indicated that it did not intend to abrogate the rights of tax lien buyers in any tax liens acquired prior to the effective dates of the Code Amendments.

Section 6 of Chapter 679 of the Laws of 1941 (Appendix A) provides:

> "All rights and remedies provided for the enforcement of tax liens and the redemption of real property affected by a tax lien sold at a sale of tax liens held prior to the first day of April, nineteen hundred and forty-one shall continue in respect of such tax liens and such real property in the same manner as though this chapter had not been enacted."

This action was therefore commenced on July 19th, 1943, by the service of a summons and verified complaint (R. 8-31) upon the Respondent and the simultaneous service of an order to show cause in aid of an application

for an injunction, pendente lite, to restrain Respondent, through its Treasurer, from issuing, to itself or any other Defendant, all tax lien buyers at the 1941 sale, any deed to any parcel of real property affected by any unmatured tax lien certificate owned by either of the Petitioners.

The application for an injunction was denied by the Supreme Court and an appeal from that order was taken to the Appellate Division. There the order of the Court below was affirmed by a vote of 4 to 1. The majority of the Court rendered no opinion, but Presiding Justice Close dissented in a memorandum (*Intercounty v. County of Nassau*, 266 A. D. 969) in which he said that he:

> "* * * votes to reverse the order in so far as appealed from and to grant the motion on the ground that the complaint states a cause of action for a declaratory judgment and that the plaintiffs are entitled to an injunction, *pendente lite*."

No appeal lay from this order to the Court of Appeals.

During the pendency of the above appeal to the Appellate Division, however, the Respondent herein made a motion addressed to the complaint for a dismissal thereof and for judgment on the ground that the same does not state facts sufficient to constitute a cause of action (R. 7).

The Court of first instance dismissed the complaint, holding that the Code Amendments were, in effect, prospective only in part, and in its memorandum (R. 32) referred to the federal question raised by Petitioners in the following words:

> "* * * First, it is suggested rather than urged that the amendment of the Tax Act is unconstitu-

tional as impairing the obligation of the Contract * * *."

An appeal was thereupou taken by your Petitioners to the Appellate Division of the Supreme Court. There the lower Court's judgment was affirmed. The Appellate Division in its memorandum (R. 42, 43) does not in specific words refer to the issue involving the federal question raised below, but does say that (R. 43):

> "The Legislature had an untrammeled right to enact the legislation under review."

In affirming the lower Court's judgment, however, the Appellate Division granted Petitioners' motion for leave to appeal to the Court of Appeals certifying "that in its opinion questions of law are involved which ought to be reviewed" (R. 40).

In a separate memorandum, Close, P. J., concurred in the result, i.e., the allowance of an appeal to the Court of Appeals, but said that he was "* * * adhering however to this position as stated in Intercounty Operating Corp. *v.* County of Nassau (266 App. Div. 969)." (R. 43.)

Throughout the appeal in the Appellate Division from the judgment of dismissal of your Petitioners' complaint, they have urged that the practical effect and operation given to the legislation under review as construed and applied by the lower Court rendered the legislation in conflict with the contract clause of the Federal Constitution and gave it effect so as to impair your Petitioners' rights under their contracts with the Respondent.

This position was taken and this point was urged on their appeal to the Court of Appeals. The judgment

of the Appellate Division was affirmed by the Court of Appeals without opinion. It is from this decision of the Court of Appeals that Petitioners come praying for a Writ of Certiorari.

2. Jurisdiction.

The date of the decision of the Court of Appeals of the State of New York of which review is here sought, is June 14th, 1944 (R. Frontispiece) and the final decree of that Court was filed June 26, 1944 (R. 44).

The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237 (b) of the Judicial Code, as amended by the Act of January 31, 1928, Chapter 14, Section 1, 45 Stat. 54, 28 U. S. C. A., Section 344 (b).

There are here involved Laws of New York, 1941, Chapters 562 and 679, amending Laws of New York, 1939, Chapter 272, and the Court of Appeals of the State of New York decided against Petitioners' rights thereunder upon their practical effect and operation, as construed and applied, so as to produce an impairment of the Petitioners' contracts repugnant to Article 1, Section 10 of the Constitution of the United States. The statutes involved are set forth at length in the Appendix.

The federal question was raised by the pleadings (R. 21, 22 and 24).

Where, as here, all the parties are before the Court in an action for a declaratory judgment, seeking a determination of their legal rights upon the facts alleged in the complaint, the relief sought is a definitive adjudication of the disputed constitutional rights of the Appellants, and the issues thus raised and judicially de-

termined constitute a case or controversy for the review of which this Court has jurisdiction.

The following cases are believed to sustain the jurisdiction of the Supreme Court of the United States.

Detroit United Ry. v. *Detroit*, 242 U. S. 238;
Nashville C. & St. L. R. Co. v. *Wallace*, 288 U. S. 249.

3. Reasons for Issuance of Writ.

This case presents questions of the first importance relating to the practical effect and operation of Acts of the State Legislature as construed and applied so as to produce impairment of contracts involving substantial sums. This was the first time this question was presented to the State Court of Appeals and if this Court grants certiorari, it will be the first time that this Court will consider the application of the Statutes to this set of facts.

Aside from the novelty and importance of the issues presented, the decision of the Court of Appeals should be reviewed for the additional reason, we submit, that it is clearly erroneous and not in accord with the principles of applicable decisions of this Court.

In so far as the decision interprets subsequent legislation so as to impair rights under existing contracts, it is not in accord with the decisions of this Court in the following cases, among others:

Walker v. *Whitehead*, 83 U. S. 357;
Bradley v. *Lightcap*, 95 U. S. 1;
Wood v. *Lovett*, 313 U. S. 362.

Wherefore, your Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of New York, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and of the proceedings of the said Court of Appeals, and that the order and judgment of the Court of Appeals of the State of New York be reversed by this Honorable Court, and that your Petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, New York, August 22nd, 1944.

Intercounty Operating Corporation
and
Salonga Farms, Inc.,
Petitioners,

By Harry Mesard,
Counsel for Petitioners.

Supreme Court of the United States

October Term, 1944

No.

Intercounty Operating Corporation, and
Salonga Farms, Inc.,
Petitioners
(*Plaintiffs-Appellants below*),

against

The County of Nassau,
Respondent,

and

Atlantic Municipal Corporation, *et al.*, etc.,
Defendants.

BRIEF IN SUPPORT OF PETITION

1. Opinions of the Courts Below.

The opinion of the Supreme Court of the State of New York, Nassau County, dismissing the complaint is found on pages 32 to 35 of the record and is officially reported, 181 Misc. (N. Y.) 390. The opinion of the Appellate Division for the Second Judicial Department affirming the judgment of the Court below and granting the motion for leave to appeal to the Court of Appeals is found on pages 42 to 43 of the record and is officially reported in 267 App. Div. (N. Y.) 957. No opinion was rendered by the Court of Appeals in affirming the judgment of the Appellate Division.

2. Jurisdiction and Statement of the Case.

The jurisdictional basis for the petition and the statement of the case are found in the petition, and for the sake of brevity are not repeated here.

3. The Questions Presented.

There are five questions which the Petitioners desire to present to this Court if certiorari is granted.

1. Did their purchases of tax lien certificates from the County of Nassau in 1939 and 1940 result in the creation of contracts between them and the County of Nassau upon terms and conditions expressed and contained within relevant statutes in effect at the times of the sales?

2. Are the rights accorded to them under such terms and conditions vested rights which could neither be abrogated, abridged nor burdened by subsequent legislation with new or additional obligations and liabilities not contained within such terms and conditions?

3. Does the practical effect and operation as permitted by the State Courts of the post-sale Code Amendments render the result oppressive and the enactments repugnant to the contract provisions of the Federal Constitution?

4. Were not the Code Amendments constitutional and did not the Legislature intend by Section 6 of Chapter 679 of the Laws of 1941 to expressly preserve all the terms and conditions in effect in 1939 and 1940 and to prohibit the abrogation or abridgement of any of the

then existing rights and the creation of any new obligation or liabilities?

5. Were not the Code Amendments entirely prospective and not prospective only in part, and may they not be given effect so as to be in harmony with the Federal Constitution and at the same time preserve valid and subsisting the rights under Petitioners' tax lien contracts?

4. Argument

POINT I

The purchase by Petitioners of tax lien certificates sold at the 1939 and 1940 sales created contracts between them and the County of Nassau governed by the applicable provisions of the Nassau County administrative code then in effect and such terms could not be substantially altered by subsequent legislation.

As was said in *Detroit United Ry.* v. *Detroit*, 242 U. S. 238, "Where this Court is called upon in the exercise of its jurisdiction to decide whether state legislation impairs the obligation of a contract, we are required to determine upon our independent judgment these questions: (1) Was there a contract? (2) If so, what obligations arose from it? (3) Has that obligation been impaired by subsequent legislation?", so let us proceed.

(1) Was there a Contract?

At tax lien sales held by the County of Nassau in the year 1939 and again in the year 1940, Petitioners purchased certificates of tax liens relating to specific real property in the county. These sales were held pur-

suant to the applicable provisions of the Nassau County Administrative Code (Appendix B), as in effect prior to the enactment of the Code Amendments (Appendix A).

In *Wood* v. *Lovett,* 313 U. S. 362, 369, this Court held:

> "* * * The Act (taxing statute) * * * taken in connection with the other statutes regulating the acquirement by the State, and the disposition by it, of lands sold for delinquent taxes, constituted, in effect an offer by the State, to those who might become purchasers of such lands; and the protection it afforded to the title acquired by such purchasers necessarily inured to every person acting under it and constituted a contract with him." (parenthesis ours)

To the same effect are decisions of Courts of the State of New York and the works of numerous text writers and authorities on this point. (*People ex rel. Oakley* v. *Bleckwenn,* 126 N. Y. 310, 313; *Dikeman* v. *Dikeman, et al.,* 11 Paige Ch. (N. Y.) 484; *Post* v. *Cowan,* 236 App. Div. (N. Y.) 26; *Cooley on Taxation,* 4th Ed., Sections 1560, 1561; *Blackwell on Tax Titles,* 5th Ed., vol. 2, Section 729; 26 Ruling Case Law 434; 12 *Corpus Juris* 1002; 51 *American Jurisprudence* 885, Section 1014.)

This Court, citing from its opinion in *Von Hoffman* v. *Quincy,* 4 Wall. 535, 550, 552, said in *Home Building & L. Asso.* v. *Blaisdell,* 290 U. S. 398, 429:

> "* * * The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement * * *. Nothing can be

> more material to the obligation than the means of enforcement * * *. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the constitution against invasion."

The difficulty, as the last cited case points out, lies in distinguishing between the obligation of a contract and the remedy given to enforce it. It is on this point, we respectfully submit, that the Court of Appeals, in affirming the judgments of the Courts below, fell into error. This question will be more fully considered hereinafter.

(2) What Obligations Arose from the Contract?

At the dates of the sales the Code provided that a period of 4 years must elapse between the date of a certificate of sale of a tax lien and the holders right to a conveyance by the County. The certificates purchased by Petitioners were subject to the "lien of unpaid taxes" for subsequent years, which, if sold in the ordinary course under existing provisions of the Code at the next annual tax sale, and thereby elevated to the stature of a "certificate of sale of a tax lien", would also be governed by the provision that a period of 4 years must elapse between the date of its sale and the right of a holder to a conveyance.

The distinction between a "tax lien" and a "certificate of sale of a tax lien", terms sometimes erroneously used interchangeably, is specifically established by definition in Section 5-24.0 of the Code, not affected by the subsequent amendments (Appendix B). The "tax lien" is the right in favor of the County to collect taxes and other charges and the lien against the property affected thereby. The "certificate of sale of a tax lien" is a con-

tract with the purchaser thereof which includes the sale of the property affected by the tax lien. And they were so judicially distinguished by our Court of Appeals in construing a similar tax statute (*City of Rochester* v. *14th Ward*, 183 N. Y. 23, 32).

Thus, at the times of the purchases by Petitioners of tax lien certificates in the aggregate amounting to a total cost of approximately $250,000.00, the Petitioners and the County of Nassau were bound by the following contract:

The tax sale purchaser, on payment of the full purchase price, was to receive a tax sale certificate describing the property sold for delinquent taxes (Sec. 5-41.0). After 4 years, he was to be entitled to the amount paid for the lien plus interest, penalties and costs (Sec. 5-48.0). He could, if he so desired, pay accruing taxes and add the amounts so paid to his lien at the same rates of interest and penalties (Sec. 5-49.0). If the lien for taxes was not satisfied by the owner, the certificate holder was to be entitled (after 4 years and upon giving notice to the owner and taking and paying for an assignment of all *prior* tax liens held by the County) to a conveyance of the property. "The conveyance shall vest in the grantee, an absolute estate in fee, subject to all claim which the county may have thereon for tax or other liens or encumbrances" (Sec. 5-53.0), or to an action in foreclosure (Sec. 5-60.0) and to a conveyance made pursuant to judgment in such action (Sec. 5-64.0).

Thus at the time of your Petitioners' purchase of tax lien certificates, there was no requirement that any tax either prior or subsequent be paid by the tax sale purchaser prior to the accrual of his right to a conveyance, and it further appears that while prior tax liens held by the County were required to be paid after the accrual of

that right but before the conveyance would issue, there was nowhere a requirement for the payment of subsequent taxes before issuance of the conveyance. The lien for subsequent taxes would attach to the lands conveyed, but the payment of subsequent taxes was not made a condition precedent to the conveyance.

These were the reciprocal rights and obligations which arose from the tax lien contracts explicit in the Code at the times of their sales and implicit in the tax sale certificates delivered to the Petitioners by the County of Nassau. The reciprocal rights to enforcement thereof without substantial alteration vested in each of them (*Wood* v. *Lovett,* 313 U. S. 362).

(3) Have Those Obligations Been Impaired by Subsequent Legislation?

While the power of the state to make just and necessary alterations in order to make more efficacious the remedies for collection of delinquent tax monies (*Curtis* v. *Whitney,* 80 U. S. 513; *Conley* v. *Barton,* 260 U. S. 677) is not questioned, the state has no untrammeled right, even under the guise of effecting such a remedy, to enact legislation which would substantially impair the obligations of the contract.

In *Wood* v. *Lovett,* 313 U. S. 362, 369, this Court, citing a long list of authorities, said:

> "The federal and state Courts have held with practical unanimity, that any substantial alteration by subsequent legislation of the rights of a purchaser at tax sale, accruing to him under laws in force at the time of his purchase, is void as impairing the obligation of the contract."

The impairment of Petitioners' contractual rights by the subsequent amendments of the Code, as construed and applied by the State Courts, consists in the following:

(A) They are called upon to take and pay for an assignment of the lien of the County for *subsequent* taxes long before they become entitled to a conveyance, and are put under a severe penalty of meeting, with additional funds exceeding the amounts initially expended for their tax lien certificates, the threat of being ousted from all their rights under their tax lien certificates.

(B) They are being pre-empted from their vested right of priority to a conveyance of the real property before the expiration of 4 years from the dates of sales of their tax lien certificates.

In support of the foregoing, the language of the Court of first instance (R. 32) will bear repetition:

> "* * * The effect upon the plaintiffs is apparent: Either they must pay large amounts of subsequent taxes sooner than the law required when they purchased their liens, or, by sales for later taxes their liens will be made worthless * * *."

These are substantial impairments of contract.

These are not the just, necessary and easy to be complied with modifications, which the State Legislature, under the necessity for giving efficacy to the remedies for the collection of funds to provide for the functioning of government, has the power, by subsequent legislation, to impose on existing contracts.

In *Curtis* v. *Whitney*, 80 U. S. 513, one of the cases cited (R. 33) by the Court of first instance, this Court said:

"The legislature, by way of giving efficacy to the right of redemption, passed a law which was *just, easy to be complied with, and necessary* to secure in many cases the exercise of this right. Can this be said to impair the obligation of plaintiff's contract, because it required her to give such notice as would enable the other party to exercise his rights under the contract?

"How does such a requirement lessen the binding efficacy of plaintiff's contract? *The right to the money or the land remains and can be enforced.*" (Italics ours.)

To the same effect is *Conley* v. *Barton*, 260 U. S. 677, 681, in which this Court said regarding a similar notice relating to a mortgage contract:

"*It does not withhold possession of the premises for a single day* * * *. It therefore only imposes a condition, *easily complied with*, which the law for its purposes requires * * *." (Italics ours.)

Applying these tests let us examine the effect and operation of the Code Amendments as construed and applied by the State Courts upon the situation of the Petitioners.

First: The modification as applied is grossly unjust. The Petitioners are deprived of vested rights in real property unless they part with large additional amounts of money long before they may even apply for a conveyance—a burden which they did not contract to undertake.

Second: The requirement is not easy to be complied with.

The Appellate Division of the State Court in its attempt to minimize the obvious threat of destruction to Petitioners' contractual rights (R. 43) says, in effect, that

it may be avoided because "the existing administrative Code afforded means by which purchasers of prior or other tax liens could protect themselves in respect of tax liens subject to which they bought". Here, apparently referring to Section 5-49.0, the Court makes compulsory what the statute granted as permissive. In any event, however, the "protection" would exact a heavy price and is not by any means as easily complied with as in the cases where a mere notice is required to be given and so effects only a change of procedure (*Lowe* v. *Sheldon*, 276 N. Y. 1), or where "the right to the money or the land remains" (*Curtis* v. *Whitney, supra*), or where "it does not withhold possession" (*Conley* v. *Barton, supra*). The requirement here is burdensome, unjust and not easily complied with and failure to comply divests the certificate holder of the right to possession of the lands. It therefore impairs the obligation of the contract.

Respondent's chief reliance in its arguments in the State Courts, and in fact, the basis of the opinions in those Courts rested on two grounds:

First: On the ground that a taxpayer has no vested right in any remedy given for the collection of taxes.

But this, while obviously true, is as obviously without application to the facts herein, and can be as readily disposed of by calling attention to the fact that there is a vast and clear distinction between a taxpayer, who has no contract and the purchaser at a tax sale, who has.

Wood v. *Lovett*, 313 U. S. 362, 371.

Second: On the ground of the inherent power of the legislature to enact remedial statutes.

That power is not questioned. The issue, however, is joined at the determination of the precise point at which

subsequent legislation, even though effecting a change in remedy, is of such a character as to interfere with substantial rights. Whenever such a result is produced by the Act in question, to that extent it is void.

> *Walker* v. *Whitehead,* 83 U. S. 357, 358;
> *Bradley* v. *Lightcap,* 95 U. S. 1;
> *Wood* v. *Lovett,* 313 U. S. 362;
> *Home Building & L. Asso.* v. *Blaisdell,* 290 U. S. 398.

Exceptions to the general rule above declared are sometimes made, so as to effect more than a mere remedial change, but in those cases it must appear:

> "* * * whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end * * *"

and that among such ends are

> "* * * the prevention of enforcement of contracts only when these are of a sort which the legislature in its discretion may denounce as being in themselves hostile to public morals, or public health, safety or welfare, or where the prohibition is merely of injurious practices; * * *"

and that

> "* * * if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood or earthquake, that power cannot be said to be non-existent when the urgent public need demanding such relief is produced by other and economic causes."
>
> (*Home Building & L. Asso.* v. *Blaisdell, supra.*)

As will hereinafter appear, no reasons for invoking the exception to the general rule was declared by the legislature in enacting the Code Amendments, nor was it necessary for the State Courts to give them so harsh and oppressive an application in order to effectuate their purpose as declared.

POINT II

The subsequent amendments of the Code, in their practical effect as construed and applied, produce a harsh, severe and oppressive result, not necessary for the purpose intended to be served by the Legislature, and the amendments can and should be construed so as to effectuate the legislative purpose without impairing vested rights of contract.

At the outset, under this point, the Petitioners wish to restate their position as regards the validity of the Code Amendments (Appendix A). Petitioners have maintained throughout their several appeals in the State Courts, that the subsequent legislation as enacted is valid and constitutional, and was not designed by the Legislature to impair their contracts with the County of Nassau, or any contracts of tax liens sold at a sale of tax liens held prior to April 1st, 1941, and that Section 6 of Chapter 679 of Laws of 1941, specifically so provides (Appendix A).

Your Petitioners, therefore, contend, not that the subsequent legislation is invalid, but rather that upon its practical effect and operation, as permitted by the State Court of last resort, the legislation is rendered repugnant to the Federal Constitution through acquiescence of a substantial impairment of contract.

It would, therefore, be interesting and instructive to consider the necessity and purpose of the legislation and to pursue the process of reasoning by which the Courts below countenanced the course of the County of Nassau.

(1) Necessity and Purpose of the Legislation.

The legislation under review was neither addressed to any existing emergency, nor intended to correct any real or apparent abuse, nor to provide relief from some urgent public need. None of the grounds for invoking the exception to the general rule were declared to exist.

The Legislature merely says that the purposes of the amendments are "in relation to the time when the receiver of taxes shall make his return of unpaid taxes to the county treasurer" and "so as to reduce the period of redemption on tax liens from four years to two years" (Appendix A).

Clearly the legislation was enacted solely for the purpose of affording an acceleration of the remedy for the collection of delinquent taxes. There is, therefore, no necessity to apply it to the Petitioners with such drastic effect. The taxes represented by the tax certificates in the hands of the Petitioners have already been paid by them to the County, and in so far as the interest of the County is concerned no further acceleration as to those taxes could be had.

The declared purpose of the enactments being solely for the reason of affording an acceleration of the remedy for the collection of prospective taxes, which, in itself, is a legitimate purpose, then, if due effect be given to Section 6 of Chapter 679 of Laws of New York, 1941 (Appendix A), it is conceded that the legislative measures as adopted are reasonable and appropriate to that end.

(2) Construing the Code Amendments.

The concession made above springs from the conviction that the Legislature, being mindful also of the possibility that the enactment without Section 6 might produce the harsh, oppressive and unconscionable result in its practical effect and operation as is here demonstrated, had deliberately inserted Section 6 of Chapter 679 of the Laws of New York, 1941, in order to give it a completely prospective operation; to save it from interfering with substantial contractual rights vested in a purchaser of a tax lien sold at a sale of tax liens held prior to the first day of April, 1941, and thereby protect it from condemnation under the Federal Constitution. On no other basis can the inclusion of said Section 6 in the legislation be logically supported.

The Court of first instance, however, did not concur with this view. In its opinion it said (R. 34-35):

> "Secondly, it is contended that the rights of the plaintiffs have been expressly saved by Section 6 of Chapter 679, of the Laws of 1941, which reads as follows:
>
> > '6. All rights and remedies provided for the enforcement of tax liens and the redemption of real property affected by a tax lien sold at a sale of tax liens held prior to the first day of April, nineteen hundred forty-one shall continue in respect of such tax liens and such real property in the same manner as though this Chapter had not been enacted.'
>
> With this view, I am unable to concur. The purpose of that section was evidently to forestall the

contention that the Statute affected any acceleration of rights with respect to tax sales held prior to its enactment. *A construction in accordance with the theory of the plaintiff would have the effect of preventing forever any tightening of legal provisions for the collection of taxes no matter how vital to the functions of government such a change might become.*" (Italics ours.)

Conceding that one of the evident purposes of this section was to forestall any acceleration of rights with respect to *pre-statute* tax sales, then it ought to follow as a matter of simple justice that its purpose was also to prevent any destruction of those rights by *post-statute* tax sales. The Court had the authority and the duty to give the Code Amendments completely prospective effect so as to prevent the harsh and oppressive result decreed by it, unless it were powerless to do so because of the reality contemplated by the emphasized words above.

Would the construction urged by the plaintiffs have had the effect of preventing forever any tightening of legal provisions for the collection of taxes? The answer is clearly "No".

At the most, only those tax liens sold at the 1941 tax sales and which affected the same property as was affected by tax liens sold in 1939 or 1940, would be required to be held in abeyance for periods of 1 or 2 years respectively, so as to prevent impairment of the contracts made with purchasers at the 1939 and 1940 sales. As to tax lien certificates sold at the 1942 sales, only those certificates affected by prior tax liens sold at the 1940 sales would be required to be held in abeyance for a period of not more than 1 year so as to prevent impairment of the contracts made with purchasers at the 1940 sales. There-

after, and at all subsequent sales, tax lien certificates would be universally effective on a 2 year redemption base.

Certainly this is not forever.

The purchasers at the 1941 tax sales purchased their liens with constructive knowledge of the existence of Section 6 of Chapter 679 of the Laws of New York, 1941, and cannot be heard to complain. In this connection, Presiding Justice Close, during the argument in the Appellate Division, pointedly indicated that the 1941 tax sale purchasers were as effectively aware of the above cited section and as effectively bound by it as if the same were printed on the tax sale certificates which they purchased.

The administrative measures required to give effect to the practical and reasonable construction of the Code Amendments outlined above would not be difficult nor involved and would have to be applied only for a short time.

Valuable contract rights are not lightly to be cast aside nor completely to be nullified because of some real or imagined administrative difficulty necessary to give them effect, nor is it a valid objection to the adoption of a certain construction of a tax statute that under it the tax may have to be computed by an algebraic formula; that it is beset with complexities, or that it will result in a multiplication of administrative difficulties. (*Harrison v. Northern Trust Co.*, 317 U. S. 474, 481; *United States v. New York*, 315 U. S. 511, 519; *State Corp. Com. v. Old Abe Co.*, 43 N. M. 367, 94 P. (2d) 105.)

Where there are two possible constructions of a statute, that one will be preferred which is liberal in favor of the citizen rather than the State, and which does not produce unfair, arbitrary or oppressive results. This Court has held that: "Taxation is an intensely practical

matter, and laws in respect of it should be construed and applied with a view of avoiding, as far as possible, unjust and oppressive consequences." (*Farmers L. & T. Co.* v. *Minnesota,* 280 U. S. 204, 212; *Burnett* v. *Niagara Falls Brewing Co.,* 282 U. S. 648, 654.)

Our own Court of Appeals, in reviewing a construction of a tax statute, has said in *City of Rochester* v. *14th Ward,* 183 N. Y. 23, 29, 30:

> "It may be that the statute admits of this construction, but before we conclude that the legislature intended to provide such a harsh and oppressive remedy we should study the act with diligence to see whether another construction, less severe upon the owner and equally effective for the city, is not reasonable and practicable."
>
> *   *   *   *   *   *   *
>
> "A taxing Statute is to be construed strictly as to the taxing power and liberally as to the owner, not only because the legislature in authorizing proceedings to divest a freeholder of his land is presumed to take unusual care to make its meaning plain, but because the citizen needs more protection than the State."

Having by its construction denied retroactive application of the acceleration of their rights with respect to tax sales held prior to the Code Amendments, the Court (R. 34-35), nevertheless, leaves the purchasers at such sales without relief from the retroactive application of the destruction of their remedies for the enforcement of those rights. A construction which not only denies the sword, but takes away the shield as well, is not favored (*Bradley* v. *Lightcap,* 95 U. S. 1, 23).

An impartial and fair application should be given to the general rule against giving retroactive operation to

statutes, which, therefore, are to be construed entirely prospective unless the legislative intent to do otherwise is expressly and distinctly declared (*Harvey* v. *Tyler*, 2 Wall. (U. S.) 328; *Fullerton Kreuger Co.* v. *Northern Pacific*, 266 U. S. 435, 437; *Schwab* v. *Doyle*, 258 U. S. 529, 534; *Trustees of Union College*, 129 N. Y. 308; *Matter of Miller*, 110 N. Y. 216; *N. Y. & O. R. R. Co.* v. *Van Horn*, 57 N. Y. 473, 477).

POINT III

The Code Amendments can and should be construed so as to effectuate the legislative intent and purpose and to bring them in harmony with the Federal Constitution.

Full and fair effect can be given to the provisions of the Code Amendments and an unconstitutional meaning can be avoided by adopting a construction of the statute consonant with the reasoning that the Legislature by inserting Section 6 of Chapter 679 of Laws of New York 1941 (Appendix A) intended to give the act wholly prospective application as to sales of tax liens held prior to April 1, 1941. So construed it would not produce the harsh and oppressive result complained of, and would be in harmony with the Federal Constitution. This Court has such power (*Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304, 313), and it is its duty so to construe it (*Porter* v. *Investors Syndicate*, 286 U. S. 461, 470; *Bratton* v. *Chandler*, 260 U. S. 110, 114; 16 *Corpus Juris Sec.*, Constitutional Law, Section 98).

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its Appellate Jurisdiction and that to such end a writ of certiorari should issue.

Respectfully,

HARRY MESARD,
Counsel for Petitioners.

APPENDIX A

Laws of New York, 1941

CHAPTER 562

An Act to amend the Nassau county administrative code in relation to the time when the receiver of taxes shall make his return of unpaid taxes to the county treasurer

Became a law April 19, 1941, with the approval of the Governor. Passed, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

L. 1939, ch. 272, § 5-23.0, subd. a, amended.

Section 1. Subdivision a of section 5-23.0 of chapter two hundred and seventy-two of the laws of nineteen hundred thirty-nine, entitled "An act to provide an administrative code for Nassau county in harmony with and supplemental to the county government law of Nassau county," as last amended by chapter eight hundred and forty-five of the laws of nineteen hundred thirty-nine, is hereby amended to read as follows:

§ 5-23.0 **Return by receiver of taxes.** a. The town receiver of taxes shall make his return of unpaid taxes, excepting school district taxes, to the county treasurer on or before the first day of October of the [1]calendar year following the delivery to him of his warrant. The town receiver of taxes shall make his return of unpaid school district taxes to the county treasurer on or before the first day of June of the [2]calendar year following the delivery to him of his warrant.

§ 2. This act shall take effect immediately.

---

1. Word "second" omitted.
2. Word "second" omitted.

CHAPTER 679

AN ACT to amend the Nassau county administrative code so as to reduce the period of redemption on tax liens from four years to two years

Became a law April 22, 1941, with the approval of the Governor. Passed, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

L. 1939, ch. 272, § 5-30.0, subd. b, amended.

Section 1. Subdivision b of section 5-39.0 of chapter two hundred and seventy-two of the laws of nineteen hundred thirty-nine, entitled "An act to provide an administrative code for Nassau county in harmony with and supplemental to the county government law of Nassau county," is hereby amended to read as follows:

b. The rate of interest and penalty at which any person or persons purchase the tax lien shall be established by his bid. The rate thus established shall be the rate of interest and penalty for a period of two[1] years from the date of such sale or if the lien is discharged prior to such time, then up to the time of such discharge.

§ 5-40.0 amended.

§ 2. Section 5-40.0 of such chapter is hereby amended to read as follows:

§ 5-40.0 **Interest on tax lien; how computed.** The maximum interest and penalties which a tax lien may carry and bear are the following:

1. If satisfied within six months of the date of sale, ten per centum on the purchase price.

---

1. Word "two" substituted for word "four".

2. If satisfied after the expiration of six months and within twelve months of the date of sale, an additional ten per centum on the purchase price.

3. If satisfied after the expiration of twelve months and within a period of eighteen months of the date of sale, an additional ten per centum on the purchase price.

4. If satisfied after the expiration of eighteen months and within a period of twenty-four months of the date of sale, an additional ten per centum on the purchase price.[2] However, if the rate of interest at which the tax lien was purchased is less than the maximum interest rate, the tax lien shall carry and bear such lower interest rate.

§ 5-48.0, amended.

§ 3. Section 5-48.0 of such chapter is hereby amended to read as follows:

§ 5-48.0 **Rights of purchasers.** There shall be due and payable to a holder of a tax lien twenty-four[3] months from the date of sale of such lien:

1. The amount paid for the lien.

2. The interest and penalty thereon at the rate for which he purchased the lien.

3. The costs and expenses which have accrued against the property affected by the lien, as provided in this article.

§ 5-51.0, subd. b, amended.

§ 4. Subdivision b of section 5-51.0 of such chapter as amended by chapter seven hundred and four of the laws

---

2. Former paragraphs 5, 6, 7 and 8 omitted.
3. Word "twenty-four" substituted for word "forty-eight".

of nineteen hundred thirty-nine is hereby amended to read as follows:

b. Such notice may be given at any time after the expiration of twenty-one[4] months from the date of the sale of the tax lien. Such notice shall either be printed or written or partly written and partly printed, and shall state briefly:

1. The lot or lots or parcel or parcels of land affected by the tax lien.

2. The year of the tax for which the tax lien was sold.

3. The expense of making searches thereon and serving the notice.

4. The last day of satisfaction of the tax lien, which day shall not be less than three months from the day of service of the same.

Such notice shall further state that the satisfaction is to be made at the office of the county treasurer at Mineola, and that in the event that such tax lien shall not be satisfied within the time stated in such notice, the holder shall elect to accept a deed of conveyance of such property or to call his money and foreclose his tax lien, as the case may be.

§ 5-60.0, amended.

§ 5. Section 5-60.0 of such chapter is hereby amended to read as follows:

§ 5-60.0 **When foreclosure action may be commenced.** The action provided for in section 5-58.0 of the code may be commenced at any time after twenty-four[5] months from the date of sale mentioned in the certificate of sale. All

4. Word "twenty-one" substituted for word "forty-five".
5. Word "twenty-four" substituted for word "forty-eight".

the provisions of the civil practice act and all other provisions of law and the rules of practice relating to actions for the foreclosure of mortgages shall apply to the action hereby authorized so far as applicable, except as otherwise provided in this article. It shall be sufficient for the plaintiff to set forth in his complaint in such action:

1. A copy of or the substance of his certificate of sale of the tax lien, and the amount of interest, penalties, additions and expenses claimed by him.

2. A statement that the tax lien has not been satisfied pursuant to section 5-50.0 of the code or that the real property affected by such tax lien has not been conveyed pursuant to section 5-53.0 of the code.

3. A statement that the plaintiff elects to recover the amount of the tax lien and the interest, penalties, additions and expenses thereon.

4. A statement that the defendants have or may have some interest in or lien upon the property affected by the action.

§ 6. All rights and remedies provided for the enforcement of tax liens and the redemption of real property affected by a tax lien sold at a sale of tax liens held prior to the first day of April, nineteen hundred forty-one shall continue in respect of such tax liens and such real property in the same manner as though this chapter had not been enacted.

§ 7. This act shall take effect immediately.

APPENDIX B

Laws of New York, 1939

Chapter 272

ARTICLE 2

Enforcement of Collection of Taxes by County Treasurer

§ 5-24.0 **Definitions.** As used in this article:

1. The term "tax" when used alone or as a part of another term, unless the context requires otherwise, includes taxes and assessments for benefit levied by or for school or special districts, towns, the county or the state, other than those assessments for benefit levied pursuant to title B of chapter eleven of the code.

2. The term "assessment" or "assessment for benefit" unless the context requires otherwise, means an assessment for benefit levied by the county pursuant to title B of chapter eleven of the code.

3. The term "tax lien" includes:

(a) The right of the county to collect taxes, penalties, interest and other charges on the real property affected by such taxes for failure to pay such taxes, and

(b) The lien against such real property for all the aforementioned items.

4. The term "sale of taxes" or "sale of a tax lien" includes the sale of the real property affected by such tax lien.

5. The term "certificate of sale" or "certificate of sale of a tax lien" means the instrument

by which the county transfers a tax lien and sells the real property affected by such tax lien.

6. The term "holder", "holder of a tax lien" or "holder of a certificate of sale of a tax lien" means the purchaser of a tax lien and of the real property affected by such tax lien or if the purchaser has transferred the certificate of sale, a person in lawful possession of such certificate of sale who claims title through the purchaser of such certificate of sale. The term "person" as used in this definition includes the county.

* * * * * * *

§ 5-41.0 **Deposit; contents of certificate of sale of tax lien.** Each purchaser at a sale of tax liens shall pay to the county treasurer ten per centum of the amount of the tax lien immediately after such sale, and the remaining ninety per centum of such tax lien within sixty days after such sale. Thereupon the county treasurer shall execute to each purchaser, including the county, a certificate in writing which shall contain:

1. A description of the real property affected by the tax lien which description shall refer to the designation of such property on the tax map, if such map has been completed.

2. The name of the owner of the real property as it appears on the tax books.

3. The interest and penalty at which such tax lien was purchased.

4. The date of the sale.

5. A statement that the tax lien was sold for unpaid school district, special district, town, county or state taxes, as the case may be.

6. The amount paid for the tax lien.

7. Such other information as the county treasurer shall deem expedient.

* * * * * * *

§ 5-48.0 **Rights of purchasers.** There shall be due and payable to a holder of a tax lien forty-eight months from the date of sale of such lien:

1. The amount paid for the lien.

2. The interest and penalty thereon at the rate for which he purchased the lien.

3. The costs and expenses which have accrued against the property affected by the lien, as provided in this article.

§ 5-49.0 **Payment by holder of certificate of sale; penalties thereon.** a. The holder of a certificate of sale of tax liens, at any time after the annual return of taxes to the county treasurer by the receiver of taxes, may pay to the county treasurer any taxes on such return and any older taxes that are a lien on such property.

b. The holder of such certificate making payment of such taxes shall be entitled to and shall receive the full amount of the taxes thus paid with interest and penalties thereon from the date of payment at the same rate and payable in the same manner as the interest and penalties at which he purchased such tax lien.

c. The taxes, so paid by the holder of the certificate of sale of the tax lien, with the interest and penalty at the rate at which the tax lien was purchased, shall become a lien on the property and shall be payable at the time of the discharge of the certificate of sale of the tax lien or at the time of completion of foreclosure proceedings out of the proceeds realized at such sale of the property.

* * * * * * *

§ 5-53.0 **Conveyance by the county when tax lien is not satisfied.** If such tax lien is not satisfied, the county treasurer shall execute to the holder of such certificate of sale of the tax lien a conveyance of the real estate on which the tax lien has been sold. This conveyance shall vest in the grantee an absolute estate in fee, subject to all claims which the county may have thereon for tax or other liens or incumbrances. Such conveyance shall be executed only upon:

1. Performance by such purchaser of the conditions which he is required to perform pursuant to this article.

2. Surrender of such certificate of sale.

3. The taking and paying for by the holder of an assignment of all outstanding prior tax liens held by the county upon the premises.

4. The filing of proof of service of notice upon owners and other interested persons as provided by section 5-51.0 of the code.

* * * * * * *

§ 5-60.0 **When foreclosure action may be commenced.** The action provided for in section 5-58.0 of the code may be commenced at any time after forty-eight months from the date of sale mentioned in the certificate of sale. All the provisions of the civil practice act and all other provisions of law and the rules of practice relating to actions for the foreclosure of mortgages shall apply to the action hereby authorized so far as applicable, except as otherwise provided in this article. It shall be sufficient for the plaintiff to set forth in his complaint in such action:

1. A copy of or the substance of his certificate of sale of the tax lien, and the amount of interest, penalties, additions and expenses claimed by him.

2. A statement that the tax lien has not been satisfied pursuant to section 5-50.0 of the code or that the real property affected by such tax lien has not been conveyed pursuant to section 5-53.0 of the code.

3. A statement that the plaintiff elects to recover the amount of the tax lien and the interest, penalties, additions and expenses thereon.

4. A statement that the defendants have or may have some interest in or lien upon the property affected by the action.

* * * * * * *

§ 5-64.0 **Conveyance vests absolute fee in purchaser.** a. The conveyance made pursuant to a judgment in any such action shall vest in the purchaser all right, title, interest, estate, claim, lien and equity of redemption in and against the premises sold:

1. Of all the parties to the action;

2. Of each person claiming from, through or under such parties by title accruing after the filing of notice of pendency of the action; or

3. Of persons whose conveyance or incumbrance is subsequent or is subsequently recorded.

b. All such parties and persons shall be barred and forever foreclosed by the judgment in such action of all right, title, interest, estate, claim, lien and equity of redemption in and to the premises sold, or any part thereof. The judgment in any such action may direct the cancellation or satisfaction of record of taxes, assessments or other claims of any of the parties to the action.

c. Such conveyance shall not affect:

1. Subsequent taxes and assessments, and sales on account thereof, and

2. Taxes and assessments which were liens on the premises at the time of the filing of a notice of pendency of the action, but for the nonpayment of which no sale had been had prior thereto, and any sale on account of such taxes and assessments.

* * * * * * *

(9414)

8

No. 443

In the Supreme Court of the United States

October Term, 1944

INTERCOUNTY OPERATING CORPORATION, and SALONGA FARMS, INC.,
Plaintiffs-Appellants,

against

THE COUNTY OF NASSAU,
Respondent,

and

ATLANTIC MUNICIPAL CORPORATION, et al., etc.,
Defendants.

BRIEF OPPOSING THE ISSUANCE OF A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

MILTON PINKUS,
Attorney for Respondent.

EUGENE R. HURLEY,
of counsel.

INDEX

TABLE OF CASES

No. 443

In the Supreme Court of the United States

October Term, 1944

INTERCOUNTY OPERATING CORPORATION, and SALONGA FARMS, INC.,

Plaintiffs-Appellants,

against

THE COUNTY OF NASSAU,

Respondent,

and

ATLANTIC MUNICIPAL CORPORATION, et al., etc.,

Defendants.

RESPONDENT'S BRIEF

POINT I.

CHAPTER 679 OF THE LAWS OF 1941, PROVIDING FOR THE ENFORCEMENT OF SUBSEQUENT TAXES, COULD NOT IMPAIR THE OBLIGATION OF THE PLAINTIFFS' CONTRACT WHICH WAS EXPRESSLY MADE SUBJECT TO SUCH TAXES.

There has been no impairment of the contract between the County Treasurer (not the County, as stated in Petitioners' brief) and the Petitioners. The purchase was made subject to subsequent taxes. The Petitioners never acquired any right to enforce their certificates against holders of subsequent tax liens.

The contract with the County Treasurer did not grant to the purchasers any particular time within which to pay the 1939 tax, then a lien on the property purchased and past due. There was no representation as to when these taxes would be sold or as to how they would be enforced. In fact, no one knew, or could know what measures the Legislature might adopt for its collection and these means were exclusively in legislative discretion (*Gautier* v. *Ditmar*, 204 N. Y. 20, 27).

The contract contained no express stipulation that the 1939 tax would be enforced just as earlier taxes had been enforced. Nor could there be any such stipulation implied (*Charles River Bridge* case, 11 Peters, 420, 529; 9 L. ed. 773, 825).

Since the Legislature was not obliged by the contract to continue the collection of taxes in any particular manner, the change accomplished by Chapter 679 of the Laws of 1941 could not impair the obligation of any contract.

POINT II.

THE COMPLAINT DOES NOT SHOW ANY CONTROVERSY BETWEEN THE PARTIES.

There is no controversy between the parties, much less one involving the Constitution. Any jural relationship is extremely remote and is entirely contingent. About the only point of contact is that both Plainiffs and Defendants claim to have valid tax titles to the same parcels of land.

Either or both may be invalid or void, or may be extinguished by redemption, rendering any judgment here meaningless.

The action is improper in form, calling merely for an opinion as to the rights of the parties, if a controversy should ever arise between them.

THE PETITION SHOULD BE DENIED.

Respectfully submitted,

MILTON PINKUS,
Attorney for Respondent.

Eugene R. Hurley,
Of counsel.